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No. 84-215 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

MULTI-STATE COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 331 of the Communications Act of 1934, as amended, authorized the Federal Communications Commission to reallocate VHF Channel 9 from New York City to New Jersey and to issue a license for that channel to the existing licensee without conducting a comparative hearing when the licensee notified the Commission that it would reallocate its channel to a community in New Jersey.

2. Whether Section 331 as applied by the Commission denied due process to an applicant for Channel 9 in New York City whose application was dismissed as moot when the channel applied for was no longer available.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-16a) is reported at 728 F.2d 1519. The report and orders of the Federal Communications Commission (Pet. App. 19a-44a) are reported at 53 Rad. Reg. 2d (P & F) 469 and 53 Rad. Reg. 2d (P & F) 671.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1984. Rehearing was denied on May 7, 1984 (Pet. App. 47a-49a). The petition for a writ of certiorari was filed on August 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1972 RKO General, Inc. (RKO), then the incumbent licensee of Channel 9 in New York City, filed its license renewal application, and petitioner Multi-State Communications, Inc. (Multi-State) filed a competing application for

the frequency. After a lengthy comparative hearing, the Commission denied RKO's renewal application, but the court of appeals remanded on the ground that the Commission had not provided a "principled explanation" for disqualifying RKO. *RKO General, Inc. (WOR TV)*, 78 F.C.C. 2d 357 (1980), 670 F.2d 215, 237 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982).

While the remand proceeding was in progress, members of Congress from New Jersey introduced legislation to secure a VHF commercial television outlet for that state. New Jersey had lacked a commercial VHF station since 1961, when the Commission approved the transfer of the license for Channel 13 in Newark to a noncommercial entity, and the new licensee obtained Commission approval to locate its main studio in New York. *NTA Television Broadcasting Corp.*, 44 F.C.C. 2563 (1961). Despite the relocation of Channel 13's principal studio, the Commission's Table of Assignments, 47 C.F.R. 73.606(b), continued to list Channel 13 as assigned to Newark. Over the next two decades, officials and residents of New Jersey, who had objected to the Commission's 1961 action, repeatedly pressed the Commission to improve service to that state. See, *e.g., Petition for Inquiry into the Need for Adequate Television Service for the State of New Jersey*, 58 F.C.C. 2d 790 (1976), aff'd sub nom. New Jersey Coalition for Fair Broadcasting v. *FCC*, 574 F.2d 1119 (3d Cir. 1978); *CBS, Inc.*, 91 F.C.C. 2d 167 (1982). One proposal, for example, would have had the Commission reallocate an existing channel to New Jersey even without the cooperation of the station licensed on that channel. However, the Commission was reluctant to force a licensee to move to New Jersey for a number of reasons, including the difficulty in selecting the licensee that would be forced to move and the Commission's concern that a New Jersey licensee would lack a sufficient economic base to provide the local news and

public affairs coverage desired by those seeking a VHF station for New Jersey. See *Petition for Inquiry*, 58 F.C.C. 2d at 803-804. When the Commission denied RKO's renewal application for Channel 9 in New York City, the prospect for a vacant channel arose, but the availability of a vacant channel for reallocation again seemed remote after the court of appeals remanded the denial of RKO's application.

Without some special incentive, it appeared unlikely that an existing licensee would volunteer to leave New York or Philadelphia, the nation's first and fourth largest markets, in order to move to New Jersey. The availability of advertising revenue in New Jersey was unproven, and it would be costly to move equipment and personnel and to acquire new offices and studios. See *Petition for Inquiry*, 58 F.C.C. 2d at 803. Any licensee who might otherwise have volunteered to move was also likely to be inhibited by the Commission's usual practice of calling for new competing applicants whenever a channel is reallocated to a new city. See, *e.g.*, *Riverside-Santa Ana, California*, 65 F.C.C. 2d 920 (1977), reconsideration denied, 68 F.C.C. 2d 557 (1978); *Tucson, Arizona*, 37 Rad. Reg. 2d (P & F) 1161 (1976); *Los Angeles, California*, 31 F.C.C. 2d 666 (1971); *Chapman Radio & Television Co.*, 1 F.C.C. 2d 1402 (1965).

Against this background, Congress intervened and provided an incentive for a licensee to volunteer to move to New Jersey. The Communications Act of 1934 was amended in 1982 to require the Commission, upon notification from a VHF licensee of its willingness to reallocate its channel "to a community within a State in which there is allocated no very high frequency [VHF] commercial television broadcast channel," to "order such reallocation and issue a license to such licensee" for a term of up to five years, "notwithstanding any other provision of law." 47 U.S.C. 331. The legislative history made clear that the statute was intended

to allow a licensee that volunteered to move to do so without having to face an immediate comparative hearing.[1]

2. On September 7, 1982, RKO, whose renewal application for Channel 9 in New York City was then pending on remand from the court of appeals, notified the Commission that it was prepared to relocate its station from New York City to Secaucus, New Jersey, upon issuance of a regular 5-year license. The Commission found that RKO satisfied the terms of the statute and thereupon reallocated the channel to Secaucus and granted RKO a license for a five-year term. Pet. App. 19a-29a.

In its decision, the Commission recognized that the Commission's Table of Assignments continued to assign VHF Channel 13 to Newark, New Jersey, and that this channel was not reserved for noncommercial use. However, as the Commission noted, this channel had in fact been used for noncommercial purposes for over 20 years. Thus, reallocation of Channel 9, as proposed by RKO, would provide New Jersey with its only commercial VHF station "and

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[1]Senator Bradley, the sponsor of the bill that eventually became law as part of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 *et seq.*, explained that his bill would

> remove the impediments which currently discourage an existing licensee in either New York or Philadelphia from voluntarily seeking to move to New Jersey. Under current law, that request would automatically trigger an action to open up that license to new applicants. In other words, the license would automatically be at risk to the current licenseholder. This makes it very unlikely that anyone would voluntarily offer to move to New Jersey.

128 Cong. Rec. S10946 (daily ed. Aug. 19, 1982). Senator Bradley also noted that "[a]s an inducement to undertake the expense of moving studio facilities, the FCC is directed to renew that license for up to 5 years in the new State." 128 Cong. Rec. S3160 (daily ed. Mar. 31, 1982).

would conform to the explicit Congressional intent to facilitate such service to the State of New Jersey" (Pet. App. 21a n.2).[2]

The Commission recognized that in permitting RKO to invoke Section 331 and receive a license for a New Jersey station on Channel 9, it was taking an action with adverse effects on Multi-State's application to operate on that channel in New York City. The Commission believed, however, that this was Congress's clear intent. In the Commission's view, the statutory language ordering reallocation and issuance of a license "notwithstanding any other provision of law," "include[d] those statutory and regulatory provisions pertaining to comparative proceedings." Pet. App. 24a.

Moreover, it was apparent to the Commission that Congress was specifically aware that the statute would apply to RKO and that it would affect competing applicants for Channel 9. In a letter to the Chairman of the House Energy and Commerce Committee, which was then considering a bill with the same language as that ultimately contained in Section 331, the Chairman of the Commission said that under the proposed legislation " '[t]he Commission would be required to grant the renewal application of the VHF licensee in question without considering other public interest factors long used in making such a decision * * *. [C]ompeting applications for the licensee's facilities would be dismissed without comparison of the qualifications of the new applicant(s) vis-a-vis those of the incumbent licensee.' " Pet. App. 26a. In addition, Multi-State had written

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[2]The Commission also observed that when RKO submitted its notification proposing to move to New Jersey, it still qualified as a licensee under the Communications Act of 1934 and the Administrative Procedure Act (see 47 U.S.C. 307(c), 331; 5 U.S.C. 558(c)) because, as a result of the court's remand, its renewal application was still pending before the agency. Pet. App. 22a.

to 22 Congressmen and Senators, stating: " '[Multi-State's] 'protected status' is well established by FCC regulations and recognized by the Commission in all its proceedings. The Bradley amendment * * * disregards this recognized right of Multi-State and will totally destroy the longstanding equity of our protected position.' " Pet. App. 27a. Under these circumstances, the Commission viewed the law as a congressional determination that the interests of competing applicants must be subordinate to the objective of securing a commercial VHF station for New Jersey. Pet. App. 27a. Accordingly, the Commission reallocated Channel 9 to Secaucus; granted RKO a five-year license to operate the station; and, in a companion decision, dismissed as moot the renewal application of RKO and the competing application of Multi-State for Channel 9 in New York City (Pet. App. 39a-44a).

3. The court of appeals affirmed (Pet. App. 2a-16a). The court rejected Multi-State's argument that Section 331 did not apply to New Jersey. After thoroughly reviewing the history of television service in New Jersey and the legislative history of Section 331, the court concluded that "[t]he conference report, viewed against the backdrop of five years of legislative efforts by New Jersey Congressmen to secure a VHF station for their state, reveals that the purpose of section 331 is to provide each 'unserved' state with an *operating* VHF commercial television station" (Pet. App. 11a) (emphasis in original). The court also determined that the Commission properly carried out its function in reallocating Channel 9 to New Jersey and granting RKO a license for that channel. The court agreed with the Commission that Section 331 "displaced the normal procedures for channel reallocation * * * [and] for issuing licenses, including the requirement of a comparative hearing" (Pet. App. 12a-13a (footnote omitted)).

Finally, the court rejected Multi-State's contention that the Commission's action violated its constitutional right to due process. The court noted that Multi-State's right to a

hearing under *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945), stemmed from a statutory scheme that was altered by the enactment of Section 331. In light of Congress's "paramount power in the regulatory field" (Pet. App. 14a), the court found "[S]ection 331 to be permissible regulation of future action: it directs the Commission, under specified and limited circumstances, to reallocate a VHF channel and issue a license for that channel." The court noted (Pet. App. 14a-15a n.12) that

> licensees of broadcasting stations acquire no prescriptive right against the subsequent exercise of congressional power under the commerce clause to delete their station to achieve fair geographical distribution of broadcast service. Federal Radio Comm'n v. Nelson Brothers Bond and Mtge. Co., 289 U.S. 266, 282 (1933). *A fortiori*, the mere expectations of a license applicant cannot bar the legitimate exercise of such congressional power.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Moreover, this case involves the interpretation of a statute that, as the court of appeals recognized, applies only in a "limited context" (Pet. App. 14a).[3] There is thus no question presented warranting this Court's review.

1. The court of appeals and the Commission correctly concluded that the legislative history of Section 331 demonstrate "beyond cavil" (Pet. App. 10a) that Section 331 was intended to apply to New Jersey. In addition to frequent

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[3]The statute applies when a VHF licensee agrees to the reallocation of its channel to a state that does not have a commercial VHF station. At the time the statute was adopted, New Jersey and Delaware were the only states in that category and at the present time Delaware is the only state without an operating commercial VHF station.

specific references to New Jersey by the statute's sponsor, Senator Bradley, and other supporters (see Pet. App. 8a-11a), the Conference Report expressly stated that "New Jersey and Delaware are the only two States that do not have a commercial VHF television station * * *. This provision will remove impediments which currently discourage a licensee in a State which has more than one VHF television station from voluntarily moving to a State which has none." H.R. Conf. Rep. 97-760, 97th Cong., 2d Sess. 690 (1982).

Petitioner nevertheless argues that the language of the statute, which refers to states "in which there is allocated no very high frequency commercial television broadcast channel," is plain on its face and forbids resort to the legislative history. Petitioner argues that a commercial VHF station is "allocated" to a state if such a station is "assigned" to the state in the Commission's Table of Assignments, 47 C.F.R. 73.606. Petitioner notes that the Table assigns a VHF channel to Newark and does not prohibit that channel from being used for commercial purposes. Petitioner then assumes that Congress intended the phrase "very high frequency commercial television broadcast channel" in Section 331 to refer to any channel not reserved exclusively for noncommercial broadcast stations (Pet. 9-10). Petitioner's argument is without merit.

The language of Section 331 does not refer to the Commission's Table of Assignments. The statute refers to a state having no "allocated" VHF channel. The technical term that the Commission has traditionally used for "the process of designating a particular television channel to a particular city or area" is "assignment," not "allocation." *Table of Television Channel Allotments*, 83 F.C.C. 2d 51, 51 n.1 (1980). The Table of Assignments, moreover, nowhere contains the statutory phrase "commercial television broadcast channel" that appears in 47 U.S.C. 331. Although the Table indicates that certain channels are not reserved exclusively

for noncommercial use, the Commission has indicated that it would be incorrect to define such a channel as a commercial channel. *Amendment of Section 3.606 of the Commission's Rules and Regulations*, 8 Rad. Reg. (P & F) 467, 469-470 (1952) ("While it has been convenient to refer to unreserved channels as 'commercial,' they are not in fact 'commercial' channels. The unreserved channels may be used commercially, or non-commercially, as the licensee sees fit.").[4]

Apart from the fact that the language of Section 331 is far from "plain," petitioner's argument misapprehends the "plain-meaning" rule. This Court has recently repeated Justice Frankfurter's warning that " '[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.' " *FBI* v. *Abramson*, 456 U.S. 615, 625 n.7 (1982), quoting *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part).[5] As the court of appeals properly concluded, petitioner's construction of the statute "would ignore congressional intent and thwart the legislative will" (Pet. App. 11a (citation omitted)).[6]

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[4]Channel 13, which the Table assigns to Newark, is an example of an unreserved channel that has been operating noncommercially. See page 2, *supra*.

[5]"[T]he plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' " *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981), quoting *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928).

[6]The decisions relied upon by petitioner (Pet. 12-16) do not require that judges read statutory language in a vacuum and close their eyes to legislative history. In *TVA* v. *Hill*, 437 U.S. 153, 174-184 (1978); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981); and *Howe* v. *Smith*, 452 U.S. 473, 483-485 (1981), for instance, this Court reviewed the legislative history of the statutes at issue and found that the legislative history conformed to the literal meaning of the statutes. And in *Badaracco* v. *Commissioner*, No. 82-1453 (Jan. 17, 1984), the Court did not even

2. Contrary to petitioner's contention (Pet. 18), the right to a hearing on an application for a television license is not a "protected property interest" "rooted in the Constitution." As the Court has stated (*Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)):

> Property interests * * * are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law * * *.

The cases cited by Multi-State (Pet. 18-19) are procedural due process cases that stand for the proposition that, when a protected property interest exists, certain due process procedures must be observed before an individual can be deprived of that property interest. Those cases do not, however, limit Congress's power to change the nature of a regulatory scheme. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432-433 (1982). See also *Goss* v. *Lopez*, 419 U.S. 565, 572-574 (1975); *Bell* v. *Burson*, 402 U.S. 535, 539 (1971).

Any property interests enjoyed by petitioner must stem from the Communications Act of 1934, not the Constitution. But under that Act, even a broadcast license confers no property right. 47 U.S.C. 301. "No licensee obtains any vested interest in any frequency." *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 331 (1945) (footnote omitted). It is recognized, for example, that Congress has the power under the Commerce Clause to delete existing channels to achieve a fair geographical distribution of broadcast service. *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage*

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address the issue of the extent to which the courts may consider legislative history when construing a statute. Here, in contrast, the meaning ascribed to Section 331 by Multi-State is not only far from plain; it is at odds with the explicit purposes of the statute as enunciated in the legislative history.

Co., 289 U.S. 266, 282 (1933). *A fortiori*, the mere expectation of an applicant cannot bar the legitimate exercise of such congressional power. The right to a comparative hearing upon the filing of mutually exclusive applications is simply a "statutory right * * * which Congress has accorded applicants before denial of their applications." *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. at 330. While petitioner had "the right to avail [itself] of the application route in an effort to perfect an interest to the extent that this was not precluded by law" (*Krueger* v. *Morton*, 539 F.2d 235, 238 (D.C. Cir. 1976)), nothing prevents Congress from changing the method of awarding licenses in order to foster reallocation of VHF channels to unserved states.

Petitioner erroneously asserts that Section 331 is unconstitutionally retroactive (Pet. 20-21). A retroactive statute imposes "unexpected liability for past, completed acts that were legally proper" when performed. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Section 331 did not impose liability for past acts; instead it operated prospectively by directing the Commission, under specified circumstances, to reallocate a frequency and issue a license for that frequency. See Pet. App. 14a. In the regulatory field, Congress has "paramount" power to alter the future rights of parties. *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958). As the Court there held (358 U.S. at 91), "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." See *New York Central R.R.* v. *White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."). In this case, Congress properly exercised its authority to change the governing rules of law in order to achieve its clearly-stated objective of improving television service in states, such as New Jersey, that lacked commercial VHF stations.

Finally, there is no merit to petitioner's equal protection claim (Pet. 21-22). The fact that the statute will rarely be invoked and that not every licensee will have the same incentive as RKO does not mean that the statute "was designed not only to save RKO General from the loss of Channel 9" or "to target and destroy" petitioner (Pet. 22). Section 331 was designed to further the legitimate objective of providing every state with an operating commercial VHF station (Pet. App. 11a). The congressional approach — offering an incentive to existing licensees to come forward and agree to a relocation — is rationally related to this objective. No more is required. *Hodel* v. *Indiana*, 452 U.S. 314, 331 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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